United States Court of Appeals

NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,* *vs.* TERRY LAWRENCE WARD, *Appellant.*	No. 22731
UNITED STATES OF AMERICA, *Appellee,* *vs.* ORLANDO LOUIE DURAN, *Appellant.*	No. 22806

APPELLANTS' SUPPLEMENTAL BRIEF REQUESTED BY THE COURT

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In accordance with this Court's request, the appellants are submitting this supplemental brief with respect to the issue of the retroactivity of the cases of *Leary v. United States* and *Covington v. United States,* decided May 19, 1969 by the United States Supreme Court, and whether such decisions can be applied to the cases of appellants.

It is clear that in these cases the government relied wholly on the presumption set forth in Section 176a of Title 21, U.S.C., reading as follows:

> "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

In this brief we are only indirectly concerned with that portion of the Marijuana Tax Act embodied in 26 U.S.C. 4744(a) which the Supreme Court held to be unconstitutional, and under which any conviction prior to the decision would have been void under the general rule as stated by the highest court of New York in *People v. Tannenbaum,* 244 N.E.2d 269, at 270, as follows:

> "Where a substantive criminal statute has been held unconstitutional, there is no alternative but to give the decision *retroactive* effect, for the declaration of unconstitutionality is a statement that the defendant has committed no crime. Were the defendant presently imprisoned, he would most certainly be entitled to *habeas corpus* relief." (Emphasis added.)

Before discussing the issue of the retroactive or retrospective operation of various Supreme Court decisions, let us first

examine *Leary*, since *Covington* was based entirely on *Leary*. It would appear from the *Leary* decision that the Court was applying earlier decisions with respect to presumptions contained in criminal statutes to the presumption contained in Section 176a.

The Court relied on the rule in *Tot v. United States,* 319 U.S. 463 (decided in 1943, many years before the instant cases), which rule was adhered to in *United States v. Gainey* (1965) 380 U.S. 63, and *United States v. Romano* (1965) 382 U.S. 136. In *Tot* the Court held the presumption unconstitutional because there was *no rational connection between the fact proved and the ultimate fact presumed.* In *Gainey* the presumption was upheld because it "did no more than accord the evidence, if unexplained, its natural probative force" (380 U.S. at 71). In *Romano* the Court held invalid the presumption that the mere presence of the defendant at an illegal still authorized the jury to infer that he was in possession, custody or control of the still.

Thus, we need not apply *Leary* retroactively in order to obtain a reversal of the conviction of the defendants, as the Court was basing its decision on previously announced rules. In fact, the Court stated:

> "We conclude that the 'knowledge' aspect of the 176a presumption cannot be upheld without making serious incisions into the teachings of *Tot, Gainey* and *Romano.*"

In his concurring opinion, Mr. Justice Black contended the section was unconstitutional and stated:

> "Congress has no more constitutional power to tell a jury it can convict upon any such forced and baseless inference than it has power to tell

> juries they can convict a defendant of a crime without any evidence at all from which an inference of guilt could be drawn. See *Thompson v. Louisville,* 362 U.S. 199 (1960)."

Since the Court, in deciding *Leary,* relied upon rules it had announced in previous cases, decided long before the instant cases, we contend that this Court should do likewise and reverse the convictions without having to consider the issue of the retroactive operation of *Leary* and *Covington.*

If this Court is of the opinion that there is the issue of retroactivity, we submit that this is one of the instances in which the decision must be held to be retroactive so far as the invalidation of the section 176a presumption is concerned. Let us examine some of the cases wherein retroactive or retrospective application of the Supreme Court's decisions occurred.

In *Bruton v. United States,* 391 U.S. 123, in the joint trial of two defendants, the confession of one was admitted but the jury was instructed to disregard it as to the co-defendant, in accordance with the rule of *Delli Paoli v. United States,* 352 U.S. 232. However, the Supreme Court overruled *Delli Paoli* and reversed the conviction, thus applying the new rule retroactively.

In *Roberts v. Russell,* 392 U.S. 293, 20 L.Ed.2d 1101, a confession was introduced, made by one defendant, and the trial court instructed the jury to disregard it as against the petitioner [his co-defendant] as in *Bruton*, but petitioner was convicted. After the Tennessee Supreme Court affirmed his conviction, he petitioned in the federal court for *habeas corpus*. The court, relying on *Delli Paoli,* denied his petition and the Court of Appeals affirmed. The Supreme Court

reversed in the light of *Bruton,* thus applying it retroactively to a collateral attack on the conviction. The Court stated:

> "We have . . . retroactively applied rules of criminal procedure fashioned to correct serious flaws in the fact-finding process at trial. [Citing many cases decided by the Supreme Court.] Despite cautionary instruction, the admission of a defendant's confession which implicates a co-defendant is such a serious flaw. The retroactivity of *Bruton* is therefore required; the 'error went to the basis of fair hearing and trial, because the procedural apparatus never assured the [petitioner] a fair determination' of his guilt or innocence."

Clearly, the above applies to the instant cases, as the "procedural apparatus" [*i.e.,* the effect and consequences of the 21 U.S.C. 176a presumption] requires retroactive application of *Leary,* if that be necessary. Moreover, the Court, in *Russell,* further stated that reliance on *Delli Paoli* was not persuasive, as attacks have been made upon it from its inception. In a like manner, as in the instant cases, many attacks have been made on 176a and successful attacks on similar presumptions, as above noted.

The Court further stated:

> "And even if the impact of retroactivity may be significant, the constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined."

In *Gideon v. Wainwright,* 372 U.S. 335 [denial of counsel at trial]; *Hamilton v. Alabama,* 368 U.S. 52 [denial of counsel at arraignment]; and *Douglas v. California,* 372 U.S. 353 [denial of appointment of counsel to indigent], the decisions

of the Court were given retroactive operation, because, as stated in *Stovall v. Denno,* 388 U.S. 293, at 298:

> "We have also retroactively applied rules of criminal procedure to correct serious *flaws in the fact-finding process* at trial." (Emphasis added.)

In *Linkletter v. Walker,* 381 U.S. 618, and *Tehan v. Shott,* 382 U.S. 406, the decisions were given prospective operation as to cases *final* at the time, but the Court implied they nevertheless were applicable to cases still pending on direct review—as are the instant cases.

In *Tehan* the Court, in support of its decision, stated at page 408:

> "All avenues of direct review of respondent's conviction were fully foreclosed more than a year before our decision in *Malloy v. Hogan, supra* [378 U.S. 1] and almost two years before our decision in *Griffin v. California, supra* [380 U.S. 609—comment on failure of defendant to take stand]."

The Court further pointed out that these were state cases in which the state courts for 50 years had relied on *Twining v. New Jersey,* 211 U.S. 78, and to apply *Griffin* retroactively "would have an impact . . . so devastating as to need no elaboration."

This consideration is not present in the instant cases, not only because the states are not involved in new rules making them subject to the Amendments of the Constitution through the Fourteenth Amendment, but also because, herein, only a federal statute is involved. Furthermore, the cases herein are not final but are still open on direct appeal.

In *Linkletter* it was held that the *exclusionary rule* of *Mapp v. Ohio,* 367 U.S. 643, should not be given retroactive

effect because prior to *Mapp* such exclusionary rule did not exist for the states. The Court pointed out that in a number of cases it had applied rules retroactively, namely, in *Gideon v. Wainwright, supra; Doughty v. Maxwell,* 376 U.S. 202; and *Griffin v. Illinois,* 351 U.S. 12. It also applied retroactively the rules respecting coerced confessions, to wit, *Jackson v. Denno,* 378 U.S. 368 [writ of *habeas corpus* granted]; *McNerlin v. Denno,* 378 U.S. 575, and *Reck v. Pate,* 367 U.S. 433 [coerced confession—*habeas corpus* granted].

In *Katz v. United States,* 389 U.S. 347, the Supreme Court, in reversing the conviction of petitioner, announced two new rules contrary to its line of earlier decisions, to wit: (a) that the reach of the Fourth Amendment cannot turn upon the presence or absence of *physical intrusions;* and (b) that the Fourth Amendment protects persons as well as places.

In *Desist v. United States* (Mar. 24, 1969) 37 U.S. Law Week 4225, the Court held that the new rules announced in *Katz,* in which previous decisions of the Court were overruled, should be given only prospective application. The Court stated:

> "While decisions before *Katz* may have reflected growing dissatisfaction with the traditional tests of the constitutional validity of electronic surveillance, the Court consistently reiterated those tests and *declined* invitations to abandon them." (Emphasis added.)

The Court further pointed out that it had accorded only prospective operation to the exclusionary rule, because the exclusionary rule was but a procedural weapon that had no bearing on guilt and the fairness of the trial was not under attack.

The Court further stated that it had abandoned the approach in *Linkletter* and *Tehan* as to prospective application, in deciding *Johnson v. New Jersey*, 384 U.S. 719, wherein it had stated at page 733:

> " . . . [O]ur holdings in *Linkletter* and *Tehan* were limited to convictions which had become final at the time *Mapp* and *Griffin* were rendered. Decisions prior to *Linkletter* and *Tehan* had already established without discussion that *Mapp* and *Griffin* applied to cases still on direct appeal at the time they were announced."

Thus, in *Desist,* the Court's latest expression on the issue of retroactivity, it decided that prospective operation of a decision which overturned old established rules was applicable only to those cases that were already final on appeal at the time of the decision. The instant cases are before this Court, and, not yet being final on appeal, the principle of prospective application should not be applied to them.

In analyzing the cases above mentioned and others, including some of the concurring and dissenting opinions thereof, we believe that certain principles underly the determination by the Supreme Court whether a particular decision should have retroactive or only prospective application, and we briefly summarize them as follows:

1. Retroactive application must be given where the Court's decision seeks to correct serious flaws existing in the fact-finding process which deprive the defendant of a fair determination of his guilt or innocence. This is the situation in the instant cases, because the defendants' guilt or innocence had no rational connection with the ultimate fact presumed. Thus, retroactive application must be given to *Leary*.

2. Prospective application is given to decisions pertaining to new rules prohibiting the use of unlawfully obtained evidence, because the new exclusionary rules are but procedural weapons having no bearing on guilt and the fairness of the trial is not under attack. Primarily involved are the methods of police in the securing of evidence.

3. Even in such cases where prospective application is determined, such prospective operation is applicable primarily–if not exclusively–to cases then final on appeal, especially in state cases.

4. Prospective operation may occur when the new rules announced are contrary to a line of decisions previously rendered by the Supreme Court, and in its latest decision it overrules the earlier decisions, which have been relied upon by police and courts in a great number of cases–especially in state cases.

5. Where the particular decision nullifies and invalidates a criminal statute (or a pertinent portion thereof) under which the defendant was convicted, the decision must be applied retroactively. This must be distinguished from those instances where the convictions take place due to the use of evidence previously authorized by court decisions, independent of statutes.

6. If there are decisions of the Supreme Court previously rendered that portend, foreshadow, indicate or support the latest decision, the latter may be given retroactive effect. As the Court in *Leary* indicated, its decision was a clarification or extension of rules announced in previous cases wherein presumptions similar to that of 21 U.S.C. 176a were involved.

CONCLUSION

In conclusion, we respectfully submit that the decisions in *Leary* and *Covington* should be applied to the instant cases, and the judgments of conviction reversed, for the following reasons, among others:

1. The presumption under 21 U.S.C. 176a constituted a serious flaw in the fact-finding process, because the presumption has no rational connection with the determination of the guilt of defendants. In fact, Mr. Justice Black in his concurring opinion in *Leary* stated it was unconstitutional.

2. The Supreme Court in deciding *Leary* did not have to overrule any previous decisions by it on the subject; it merely extended to 21 U.S.C. 176a its rulings in previous cases where similar presumptions were involved. Thus, there had been no period of reliance on previously announced rules by the Supreme Court.

3. *Leary* did not involve any exclusionary rules or rules of police administration and methods, made applicable to the states under the Amendments of the Constitution via the Fourteenth Amendment.

4. The instant cases are not final, being still open on appeal, and hence *Leary* is applicable to them, since most cases of prospective operation have been limited to cases already final on appeal, especially state cases.

Therefore, we urge that this Court reverse the convictions of appellants.

Respectfully submitted,

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RUSSELL E. PARSONS
Of Counsel

DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 315 Third Street, Huntington Beach, California 92646, that on JULY , 1969, I served the within APPELLANTS' SUPPLEMENTAL BRIEF REQUESTED BY THE COURT (CASE NO. 22731 and CASE NO. 22806) on the following named party by depositing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said party at the address as follows:

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UNITED STATES COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JULY , 1969, at HUNTINGTON BEACH, CALIFORNIA.

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D. A. Standefer

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